No. 89-1245

In The
Supreme Court of the United States

October Term, 1989

ROBERT COHEN, individually and as a Partner of SIMON COHEN REAL ESTATE & MANAGEMENT CO., SIMON COHEN REALTY CO., SIMON COHEN COMPANY and ALJER REALTY CO. suing on behalf of himself and all other partners, both general and limited, and in the right and on behalf SIMON COHEN REAL ESTATE & MANAGEMENT CO., SIMON COHEN REALTY CO., SIMON COHEN COMPANY and ALJER REALTY CO.,

Petitioners,

-against-

ROBERT J. REED, SIDNEY HACKELL, BEATRICE POTTER and the FIRST NATIONAL CITY BANK, individually and as Executors of the Last Will and Testament of SIMON COHEN, deceased, WILLIAM B. F. WERNER, individually and doing business as MID-ISLAND HOSPITAL, JUAN SOTO, ELAINE WILSCHEK, J.S.K. CLEANING SERVICES, INC., JUDAH FEINERMAN, JASDANE, INC., SHELDON KATZ, VOLUME FEEDING, INC., DADGAB, INC., BRIMSCO, INC., SIMON COHEN REAL ESTATE & MANAGEMENT CO., SIMON COHEN REALTY CO. and ALJER REALTY CO.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department.

BRIEF OF RESPONDENTS JUAN SOTO, ELAINE WILSCHEK, J. S. K. CLEANING SERVICES, INC., SHELDON KATZ and VOLUME FEEDING, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents Juan Soto, Elaine Wilschek, J. S. K. Cleaning Services, Inc., Sheldon Katz, and Volume Feeding,

Inc.,* respectfully submit this Brief in Opposition to the Petition of Robert Cohen for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department. Respondents urge that Petitioner has not invoked any right protected by the Constitution of the United States, nor does his Petition raise an issue of such conflict or of such inherent importance as to require resolution by this Court.

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* Disclosure Statement Pursuant to Rule 29.1: There are no parent companies of J.S.K. Cleaning Services, Inc. and Volume Feeding, Inc., or any subsidiaries not wholly owned by these corporate respondents.

COUNTERSTATEMENT OF THE CASE

This litigation was commenced by Robert Cohen, the only child of the late Simon Cohen, in 1971. In it, Mr. Cohen, puporting to act individually and as representative of various partnerships and corporations created by his father, sued his father's Estate and various other parties including these Respondents for moneys which he alleged were diverted by his father from the profits of Mid Island Hospital, a proprietary hospital located in Plainview, New York. One of the partnerships, Simon Cohen Real Estate & Management Co., known under the acronym, "SCREAM", held the rights to the real estate on which the hospital was erected and was entitled, as part of its rent, to a portion of the profits of the hospital. While the hospital was owned by Respondent William B. F. Werner, M.D., Simon Cohen was the managing director of the hospital and had admitted influence in its financial affairs.

As a management technique, Simon Cohen followed the accepted and often recommended practice of contracting out to vendors those services which the hospital did not have to perform itself. Where appropriate, he assisted existing personnel in organizing business entities that could compete for hospital business. Thus, Respondent Volume Feeding was organized under Respondent Katz to take over the dietary operations of the hospital and Respondent J. S. K. Cleaning Services was organized under Respondents Soto and Wilschek to furnish housekeeping services to the hospital. It was not the first time the hospital had used outside cleaning services and the hospital was far from J.S.K.'s only account. Simon Cohen's stated reason

for dealing with such independent entities and even assisting their organization was to compartmentalize the operations of the hospital, to free hospital management from the array of labor/management issues that each specialty engendered, and to give the hospital flexibility in management decisions. As noted, Petitioner Robert Cohen argued below that the true but unstated reason Mr. Cohen fostered this method of operation was to shrink the profits of the hospital and thereby reduce the rents payable to himself, to Petitioner and the other partners of SCREAM. In fact Petitioner argued, Simon Cohen then secretly made arrangements to get the money back from these parties for his own account and purposes.

The merits of Petitioner's case are largely irrelevant to the issues before this Court. The case was settled. It is not the merits of that settlement that Petitioner argues to the Court, at least directly, but the method by which it was settled that is at the core of Petitioner's presentation to this Court.

The sequence of events leading to the settlement are not in serious dispute and are set forth in the Opinion of the Appellate Division of May 5, 1986 (Reproduced at Ai - Axi), and the opinions of the trial court dated April 6, 1983, June 22, 1983, April 27, 1984 (reproduced at A248, A261 and A286, respectively). The case was on trial in Spring of 1981 when, under the guidance of the trial court, settlement discussions were begun. Various settlement proposals were made by the defendants and Petitioner made his responses. While these discussions were not "of Record," that they had taken place was clearly brought out in March of 1982 when Petitioner's then

attorney, Stephen Hochhauser prompted by Petitioner's effort to replace him, filed papers with the trial court informing the court of Petitioner's intransigence on the matter of informal resolution, of Mr. Hochhauser's opinion that Petitioner was acting for motives other than the best interests of those he represented, suggesting that Petitioner be removed as such representative and, in any event, asking for further instructions on what he, Hochhauser, should do under the circumstances. In decision dated August 2, 1982 (A138) the trial court directed the Petitioner to give notice to the other partners of the organizations he was purporting to represent informing them of the proposals that had been made and advising them of a right to be heard on any of these matters. The Notice was mailed, but Petitioner elected to include his own, unauthorized, position paper with the mailing. Ultimately, Petitioner was not removed as representative and Mr. Hochhauser was relieved of a representation that had placed him conflict. On January 18, 1983, the trial court directed a further Notice be distributed to all of the involved parties (without the benefit of Petitioner's inserts) including the current state of settlement proposals and soliciting a response by February 16, 1983 (A205). Responses were received which were overwhelmingly favorable and the trial court, after making some adjustments indicated in the comments, approved the settlement in the Order herein complained of.

The settlement affected only that part of the action in which Petitioner sought to act as a representative. It left him free to pursue independently whatever remedies were available to him as an individual. Petitioner chose not to pursue his

personal rights and voluntarily discontinued his individual action (A405).

The New York Court of Appeals, the State's highest court, declined to exercise discretionary review of the case (A463).

This is respectfully submitted that on the facts presented there is no occasion for intervention by this Court.

THE PETITION SHOULD BE DENIED

POINT I

NO FEDERAL ISSUE IS PRESENTED BY THIS CASE

Petitioner urges that, "review is needed to prevent a miscarriage of justice." (Br. P. 11). It is axiomatic, however, that this Court does not sit to right all perceived wrongs. Its jurisdiction in certiorari is limited by statute and by sound principles of federalism to situations "where any title, right, privilege, or immunity is . . . claimed under the Constitution or the treaties or statutes of . . . the United States." 28 U.S.C. § 1257.

At the threshold of a determination of whether such right, privilege or immunity exists is the preliminary question of whether such right, privilege or immunity was claimed before the state court and passed on by it. Petitioner quotes two brief excerpts from his briefs to the appellate division to establish that the constitutional issue was before the state court. The references are ambiguous, unspecific and far from the kind of argument that would call for a response from the state court. A mere casual reference in a brief to possible federal claims does not raise the constitutional issue. *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 95 L.Ed2d 474, 107 S.Ct. 1940 (1987); *Webb v. Webb*, 451 U.S. 493, 68 L.Ed2d 392, 101 S.Ct. 1889 (1981). Moreover, the decision of the appellate division is utterly silent concerning any constitutional issue. Failure by a state court to even mention

the federal issue gives rise to the presumption that the federal question was not considered by the state court. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 76 L.Ed 2d 497, 103 S.Ct 2296 (1983) *Fuller v. Oregon*, 417 U.S. 40, 40 L. Ed2d 642, 94 S.Ct. 2116 (1974); *Street v. New York*, 394 U.S. 576, 22 L. Ed2d 572, 89 S.Ct. 1354 (1968).

Even assuming, *arguendo*, that a proper federal issue was raised before the state court, this Court nonetheless declines review where the decision below can be justified on independent state grounds. *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 94 L.Ed. 562, 70 S.Ct. 252 (1950). Here, as emphasized by Petitioner, his standing to commence any action as representative and on behalf of the various limited partnerships was a creature of the New York statute. It was for New York alone to determine the operation and effect of that statute and the scope of the rights and obligations created thereby. The decision of the appellate division interpreted the statute and defined those rights. The decision is wholly supportable on those grounds alone. The alleged federal question is immaterial.

Petitioner cites no case entitling him, as a matter of federal law, to act as a fiduciary for these partnerships. Turning to the narrower issue presented by this case, he has also failed to cite any statute or decision that, as a matter of federal law entitled him, even as such fiduciary, to exercise total, unsupervised and unlimited right to control all aspects of the litigation. It is doubtful such a case could be found because even if a fiduciary elects to minimize his obligations to his *cestuis que trustent*, the court, even more than he, is charged

with overseeing that those rights are properly respected. It cannot stand idly by while obligations are sacrificed to personal objectives and it would be a remarkable holding indeed that required a state court, as a matter of federal law, to refrain from exercising supervision over fiduciarys before it.

Petitioner urges that it was inconsistent for the state court to decline to remove him as representative of the partnerships, on the one hand, and then restrict him in the scope of his discretion over the case and to go, in effect, over his head on the question of settlement. That hardly seems a federal issue, but it must further be asked what required the state court to assume an all-or-nothing approach to the matter? Was it obliged to keep Mr. Cohen and all his works or risk having a representative litigation that had been pending before it for almost 15 years become leaderless and even more difficult to resolve? The record is barren of any volunteers to assume Mr. Cohen's position.

Petitioner is incorrect when he urges that the actions of the New York courts were unprecedented. Numerous cases have gone to settlement over the objection of the representative plaintiff. *See, e. g., Flynn v. FMC Corp.*, 528 F. 2d 1169 (4th Cir. 1975), *cert. denied*, 424 U.S. 967, 47 L.Ed2d 734, 96 S.Ct. 1462 (1976); *Alliance to End Repression v. City of Chicago*, 91 F.R.D. 182 (N.D. Ill. 1981); *Armstrong v. Board of School Directors*, 471 F.Supp. 800 (E.D. Wis. 1979), *aff'd*, 616 F.2d 305 (7th Cir. 1980); *Purcell v. Keane*, 54 F.R.D. 455 (S.D.N.Y. 1972). That Petitioner elected to dismiss counsel who disagreed with him on

settlement terms does not vitiate the conversations that had, in fact, taken place.

Petitioner seeks to distinguish these cases on the ground that the class members had the right to "opt out" of the settlements. What Petitioner omits is that the decision of the trial court left him, too, free to pursue his personal remedies. He, for tactical reasons, elected to discontinue his personal suit.

Petitioner has presented no discernable right, privilege or immunity protected by federal law. Whether such rights as he alleges were presented to and passed upon by the state court is far from established. In any event, there are independent state grounds supporting the decision below.

POINT II

NO ISSUES OF PUBLIC IMPORTANCE ARE PRESENTED ON THIS PETITION

Even if a federal question were presented on this Petition, Petitioner has done nothing to satisfy the further requirements for certiorari under Rule 17.

In view of the precedents created under Federal Rule of Civil Procedure 23, cited above, the so-called federal issue in this case, even accepted as a federal question, seems almost frivolous.

"Importance" means something more than an interesting academic question, or even a matter of substantial importance to the parties. It must be a matter of public concern that calls for this Court's resolution. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 99 L.Ed. 897, 75 S.Ct. 614 (1955). Nothing has been shown demonstrating the slightest public importance of the issues at bar. For that reason alone the Petition should be denied.

Petitioner argues, however, that this Court should consider his case because the Court has never directly addressed the question of the power of a court in a derivative action to impose a settlement in the absence of an agreement among the litigants. (Br. P. 11) That may be so, but it is a factor that militates against, not in favor of, certiorari. Under established principles, the Supreme Court (or any other federal court)

should not make constitutional formulations unnecessarily. *Rice v. Sioux City Memorial Park Cemetery, Inc., supra*; *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 80 L.Ed. 688, 56 S.Ct. 466 (1936). Nothing in the presentation to this Court makes such a pronouncement necessary.

CONCLUSION

For the reasons stated, the Petition of Robert Cohen for Writ of Certiorari should, in all respects, be denied.

Dated: February 23, 1990

Respectfully submitted,

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